Institutional Controls as a Component of NC's Brownfields Program

prepared for

Brownfields Workshop For Developers and Local Governments

McKimmon Center, April 1, 2004

Robert Gelblum

Special Deputy Attorney General

The dirty little secret: "Institutional Controls" essentially means Land Use Restrictions (LURs)

(a.k.a., in one form or another, Restrictive Covenants, Equitable Servitudes, Easements)

You should be grateful for LURs

After all, without them, government would lack sufficient confidence in the integrity of cleanups to less than unrestricted use standards

Government needs confidence not only in the "imposability" of LURs (that's the easy part), but in their *enforceability*.

Historically, that's been far from a done deal.

Until the advent of statutes such as our Brownfields Act, "strangers" to a LUR "deal" (i.e., those lacking a parcel benefited by the restriction) could very rarely enforce the deal.

It's what lawyers called the "easement in gross" problem.

Now, with the help of statutes that "trump" the common law, 3rd parties such as the state may, with confidence re: enforceability, accept LURs in lieu of some or all cleanup at a contaminated site.

LURs, in essence, "fill the gap" between the level of protectiveness to be provided by any actual remediation at a site and the level that would be reached by a cleanup to unrestricted use standards.

Just as with restrictive covenants, LURs may come in any flavor or form, i.e., they may prohibit (or require) any actions necessary to make the site safe for the use intended.

The most common LURs, in the context of the Brownfields Program (and all other environmental cleanup programs), are, of course, those relating to the likes of permissible uses of the property in general, groundwater use and dealing with contaminated soil.

It is assumed that LURs will be "on the books" unless and until the Prospective Developer (or a future owner of the Brownfields property) convinces DENR the contamination has been actively or passively remediated to unrestricted use standards.

Following execution of a Brownfields Agreement, the Prospective Developer records the document containing the LURs (the Notice of Brownfields Property) at the local Register of Deeds' office.

Bottom line: The Brownfields Program cannot do its duty to protect public health and the environment without requiring LURs at sites to be partially cleaned up; therefore, all stakeholders should become familiar with them.